

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

Case No.: JA 12/2007

ALL MAN LABOUR SERVICES CC

Appellant

and

**THE SERVICES SECTOR EDUCATION &
TRAINING AUTHORITY**

Respondent

JUDGMENT:

DAVIS JA:

Introduction

[1] Appellant approached the court *a quo* for an order to compel respondent to pay monies to it in respect of skills training on the basis, it alleged, that it was entitled to a grant.

[2] Respondent had paid the appellant certain monies but declined to pay the full amount which had been claimed by appellant. Essentially there were two reasons why the respondent refused, namely:

- (i) the amount claimed by appellant did not represent the amount actually spent by it on training during the year ending 31 March 2003.

- (ii) the amount claimed by appellant was in respect of training provided by trainers who were neither accredited nor in the process of being accredited by appellant or the South African Qualifications Authorities.
- [3] Appellant's claim was dismissed by the Labour Court. With the leave of that Court, appellant has approached this court on appeal.

The Factual Background

- [4] Applicant conducted its business in the form of outsourcing of maintenance services. It is registered in the services sector as an employer with the respondent, a so called SETA, established in terms of section 9 of the Skills Development Act 97 of 1998 ("The Act"). Appellant is obliged to pay a skills development levy to respondent in terms of the Act. The levies are payable in terms of the Skills Development Levies Act 9 of 1998 and are paid annually to the South African Revenue Services.
- [5] Respondent allocates grants to employers which qualify for such grants in terms of the Act and Regulations. Respondent introduced a quality assurance policy together with certain further criteria which established the requirements to qualify for such a grant. These requirements are neither contained in the Act nor in the Regulations.
- [6] In an answering affidavit deposed to by Ms Prelini Kana, the company secretary of respondent, the reasons for the introduction of quality assurance criteria which

had to be met before an employer is entitled to receive a grant, as envisaged in the Act read with regulation 6(1) (b) and 6(2) (b), are set out thus:

“In terms of Respondent’s quality assurance criteria, before an employer can become entitled to receive the grant envisaged by the SDA and regulation 6(1)(b) and 6(2)(b) of the Regulations (“**the implementation grant**”), in addition to the requirements set out in the aforesaid Regulations, Respondent requires that each application for an implementation grant be subjected to the following criteria and procedure:

STEP 1

An assessment of whether Respondent has jurisdiction to consider a particular employer’s application for an implementation grant. This is done upon receipt of the application by determining whether the applicant concerned is an employer member of Respondent.

STEP 2

An assessment of whether Respondent has received payment of the skills levy from the employer concerned. This is a three part process consisting of confirming:-

1. firstly; whether the skills levy has been paid to SARS;
2. secondly; whether SARS had transferred this money to the DOL; and
3. thirdly; whether the DOL has transferred the money to Respondent.

STEP 3

Checking if all the documents required have been duly completed and attached to the application and have been signed by the relevant parties.

STEP 4

Determining whether a WSP has been submitted to Respondent and whether such WSP is approved and in effect at the workplace concerned.

An employer has one year in which to submit its ATR after submission and approval of its WSP.

STEP 5

Once Respondent receives an employer's ATR, Respondent compares that ATR with the WSP previously received from the employer. This process is to ensure that the substantive content of the ATR reconciles with the substantive of the WSP.

STEP 6

Confirming that the training that an employer provides to its employees is preformed either by an accredited training provided or that the training provider was in the process of obtaining accreditation at the time of the training. Recognized accreditation is in terms of any ETQA in turn accredited by SAQA. Accreditation by Respondent itself, whilst sufficient, is not a prerequisite.

Respondent is audited annually by SAQA. This audit *inter alia* vets Respondent's quality assurance criteria and particularly the issue of accreditation of training.

STEP 7

Determining by Respondent of proof of training expenditure.

Where training is purchased by an employer from an external training provider (as in Applicant's case) Respondent restricts payment of the implementation grant to the lesser of the amount actually spent by the employer on training or 45% of the total skills levy paid by the employer over the relevant period. Accordingly Respondent pays employers Rand for Rand the moneys spent on training, subject to a maximum of 45% of the levy paid by an employer.

Where training is conducted by the employer itself and that employer is accredited (or in the process of accreditation) in line with Step 6 above, the employer may ascribe a real monetary value to the cost of the training conducted and will be entitled to receive a grant accordingly.

As a public institution Respondent must also comply with the duties placed upon it by the PFMA.

[7] Regulation 6(2) (b) requires a body, such as respondent, to pay to a qualifying employee an amount equal to 45% of the total levies paid by such employer in terms of the Skills Development Levy's Act. In essence, appellant's case is that the respondent has refused to pay the full amount of the 45% grant to which it was entitled in terms of the Regulation for the year ending 31 March 2003, the amount being R45 004, 14, which amount was claimed in terms of an amended notice of motion of 8 April 2005.

[8] The nature of the dispute is framed in two letters, one generated by appellant's attorney of 15 March 2004 and a reply thereto by respondent of 24 March 2004. On 15 March 2004 appellant's attorney wrote claiming the amount of R50 180, 46 (later amended to R45 004,14 as I have set out). The letter then continues. "We are of the opinion that our client complied with all the requirements in terms of legislation to be paid in respect of the 45% compulsory grant. You are hereby notified to pay the shortfall... within seven days of this letter failing which our instructions are to seek relief from the Labour Court in this matter".

[9] In the reply of 24 March 2004 respondent wrote:

"The policy of the Levies and Grants Division of the Services SETA with regard to the payment of grants to our member companies states that we require proof of accreditation of the training providers used by our member companies, and further, that the implementation grant is limited to 45% of the levies that are paid to SARS.

Disbursement of the implementation grant is calculated on a “rand for rand” basis, meaning that a member company is reimbursed for expenses actually incurred as per proof of expenditure for training, and implementation of the Workplace Skills Plan. The expenses incurred may therefore not be the equivalent of the 45% of the levies that are paid.

The Services Seta places a strong emphasis on quality assuring the Workplace Skills Plans and Annual Training Reports that are submitted by our members, and we do not advocate the reimbursement of grants on submission of the documents.”

[10] In addition the letter contained an annexure setting out the respondent’s policy as at 24 March 2004. In this annexure, the following appears:

“You are entitled to a return of 45% of your contribution to compensate you for money spent when implementing your workplace skills plan and for staff training you have funded. The disbursement is limited to the lesser amount of the money spent on training or the 45% of skills levies paid to SARS. **The training providers utilized to do the training should be in the process of obtaining accreditation and if the skills development function is done in-house the training centre must also be in the process of obtaining accreditation.**”

Appellant's Case

[11] In essence, appellant's case turns on the question of the legality of the quality assurance criteria employed by respondent in refusing to pay applicant the amount so claimed. Mr Brassey who appeared on behalf of the appellant, accepted that respondent can adopt policies and practices to achieve its objectives but submitted that such policies and practices had to be compatible with the enabling legislation. In his submission, the approach adopted by respondent in its letter of 24 March 2004 was matter neither authorized by the Act nor by the Regulations and, indeed, manifestly incompatible with this enabling legislation.

[12] In order to understand the import of Mr Brassey's submissions, it is necessary to examine certain key provisions of the Act and the Regulations.

[13] The purpose of the Act is set out in the long title thereto as follows:

“To provide an institutional framework to devise and implement national, sector and work-place strategies to develop and improve the skills of the South African workforce; to integrate those strategies within the National Qualifications Framework contemplated in the South African Qualifications Authority Act, 1995; to provide for learnerships that lead to recognised occupational qualifications, to provide for the financing of skills development by means of a levy-financing scheme and a National

Skills Fund; to provide for and regulate employment services; and to provide for matters connected therewith.”

[14] Section 2 of the Act then amplifies on the long title by setting out the express purpose of the Act:

“Purpose of the Act

- (1) The purposes of this Act are –
 - (a) to develop the skills of the South African workforce –
 - (i) to improve the quality of life of workers, their prospects of work and labour mobility;
 - (ii) to improve productivity in the work-place and the competitiveness of employers;
 - (b) to increase the levels of investment in education and training in the labour market and to improve the return on that investment;
 - (c) to encourage employers –
 - (i) to use the workplace as an active learning environment;
 - (ii) to provide employees with the opportunities to acquire new skills;
 - (iii) to provide opportunities for new entrants to the labour market to gain work experience; and
 - (iv) to employ persons who find it difficult to be employed.

- (d) to encourage workers to participate in learnership and other training programmes;
- (e) to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education;
- (f) to ensure the quality of education and training in and for the work place. ...” (my emphasis)

[15] Section 7 of the Act provides for the functions of the body such as respondent:

“Functions of SETA

(1) A SETA must, in accordance with any requirements that may be prescribed –

- (a) develop a sector skills plan within the framework of the national skills development strategy;
- (b) implement its sector skills plan by-
 - (i) ...
 - (ii) approving work-place skills plans;
 - (iii) allocating grants in the prescribed manner to employers, education and training providers and workers; and
 - (iv) monitoring education and training in the sector.
- (g) liaise with the National Skills Authority on-
 - (i) the National Skills Development policy;

- (ii) the National Skills Development strategy; and
 - (iii) its sector skills plan;
 - (h) report to the Director –General on –
 - (i) its income and expenditure and
 - (ii) the implementation of its sector skills plan;
 - (k) perform any other duties imposed by this Act or the Skills Development Levies Act or consistent with the purposes of this Act.
- (2) A SETA has –
- (a) all such powers are necessary to enable it to perform its duties referred to in sub-section (1); and
 - (b) the other powers conferred on the SETA by this Act or the Skills Development Levies Act.
- (3) A SETA must perform its functions in accordance with this Act, the Skills Development Levies Act and its constitution. (my emphasis)

[16] Section 36 of the Act permits the Minister of Labour, after consultation with the National Schools Authority, to make regulations relating, *inter alia*, to any matter which may or must be prescribed under this Act. Of particular relevance to the present application is Regulation 6 which deals with the allocation of grants by a body such as respondent in the following terms:

“Allocation of grants by SETA

- (1) A SETA must allocate a mandatory grant to an employer if-
 - (a) the employer has submitted an application for a grant in the form prescribed in annexure A to the regulations; or
 - (b) the employer has submitted an application for a grant in the form prescribed in annexure B to these regulations.
- (2) The mandatory grants to be paid by the SETA in terms of
 - (a) sub-regulation (1)(a) must be equivalent to 15% of the total levies paid by the employer in terms of section 3(1) of the Skills Development Levies Act during each financial year; and
 - (b) sub-regulation (1)(b), must be equivalent to 50% for the 2001/2 financial year and 45% for the 2002/3 and 2003/4 financial years of the total levies paid by the employer in terms of section 3(1) of the Skills Development Levies Act.”

[17] The Regulations include a section entitled “**Skills Development Regulations Guidelines**” of which paragraphs 6 and 7 provide:

“The first two grants – for the submission of a work-place skills plan, and for a subsequent implementation report on the training provided – must be paid by the relevant SETA as long as an employer submits the application correctly on time, as assessed by the appropriate SETA. The regulations refer to these as mandatory grants.”

[18] The present dispute concerns the application of Regulation 6(2) (b). Mr Brassey contrasted this provision with Regulation 6 (3) which provides:

“A SETA may of any surplus moneys determine and allocate discretionary grants to –

- (a) an employer if the employer has submitted an application for a discretionary grant in the form prescribed in Annexure C to these Regulations; and
- (b) education and training providers and workers if the education and training providers and workers concerned have submitted an application for a discretionary grant in the form prescribed in Annexure D to these Regulations.”

[19] Mr Brassey noted that a body such as respondent was given a discretion in regard to grants to be paid, but only in terms of grants made in terms of Regulation 6 (3). By contrast, the grants which are to be paid in terms of Regulation (6) (2)(b) are mandatory grants. In this case, respondent had no discretion to refuse an award once the criteria set out in the applicable regulation had been met.

[20] In short, Mr Brassey submitted that the attempt by respondent to introduce further requirements in terms of its quality assurance criteria before a payment could be made out, was *ultra vires* the regulations. He submitted that the Regulations had drawn a distinction between a mandatory grant and a discretionary grant. Only in

terms of latter grant, submitted Mr Brassey, could respondent impose further requirements before making a payment. In this connection, Mr Brassey referred to previous Regulations which had been published by the Minister of Labour in consultation with the National Skills and Authority regarding the skills levies to be disbursed by bodies such as respondent Government Gazette 6729: 7 February 2000. In his submission, an examination of this set of Regulations, read with the Regulations which applied to the present dispute, shows that it had been the intention of the Minister to ensure that the levy would be paid out to employers on a mandatory basis without any further requirements being imposed by the relevant authority such as respondent. Thus, so went the argument intention of the present Regulations was to provide for mandatory grants which had to be paid by respondent upon submission of the application form by a party such as applicant.

Respondent's case

[22] In his written heads of argument Mr Marcus, who appeared on behalf of the respondent, referred to the purpose of the quality assurance criteria as set out in the answering affidavit, none of which had been disputed by appellant. The relevant part of the answering affidavit reads:

“The purpose of these criteria is *inter alia* to:

1. ensure that the purpose of the SDA, that is, to develop the skills of the South African workforce, is achieved;
2. ensure the quality of education and training in and for the work-place;

3. prevent fruitless and wasteful expenditure and expenditure not complying with the operational policies of the SETA;
4. prevent abuse of and fraud in respect of the skills development levy/grant system;
5. monitor education and training in the service sector.”

[23] In Mr Marcus’s submission, if an employer was entitled to claim implementation grants, irrespective of how much they have spent on educational training for their workforce and without any proof of, or, control in respect of, the quality of the educational training, the very purpose of the Act as set out in section 2 of the Act would have been undermined. Furthermore, submitted Mr Marcus, a body such as the respondent would not be able to fulfill its reporting functions and duties properly nor would it be able adequately to develop and implement its sector skills development plan. (Sections 2 and 7 of the Act). Mr Marcus submitted further that the appellant had not taken issue with the manner in which the quality assurance criteria had been formulated or published. There was no attack on the contents of the policy which appellant had conceded to be reasonable. Thus, the appellant had confined its attacks solely to the question of the legality of the policy; that is the power of respondent to impose these criteria. In his submission, these criteria were necessary for respondent to implement its statutory duties.

Evaluation

[24] The policy implemented by respondent must be viewed within the scope of the *dictum* of the House of Lords in British Oxygen v Ministry of Technology [1971] AC 610 (HL) which was recently affirmed by the Supreme Court of Appeal in Kemp NO v Van Wyk 2005 (6) SA 519 at para 10:

“What the authority must not do is to refuse to listen at all. But a Ministry of a large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say – of course I did not mean to say that there need be an oral hearing.”

[25] Nugent JA adds an important gloss in Kemp at para 1: “[G]enerally there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case.”

[26] Respondent was required to process a multitude of similar applications. It was entitled to develop a policy to deal with these applications which policy was reduced to a set of quality assurance criteria. This policy fulfills the very purposes articulated in Kemp’s case, *supra*.

[27] The fallacy in Mr Brassey's submission and the concomitant necessity for the kind of policy which was confirmed by the Supreme Court of Appeal in Kemp supra is illustrated in an examination of the application form for the mandatory grant as set out in Government Gazette 22398 of 22 June 2001. In the questionnaire provided in the Gazette, a party, such as applicant, is asked questions such as, name of skills development facilitator, list education and training programmes provided, report on training provided to beneficiaries. Assuming that an applicant answered that there was no trainer nor was any training given at all, the question would arise as to whether the respondent would be obliged to pay the mandatory grant to the applicant. Mr Brassey answered in the affirmative. He submitted that these questions were designed simply to gain information on behalf of the respondent so that it could assess the broad progress of training under its jurisdiction. There is no support for this submission in any of the papers placed before this court. In addition, this explanation fails to deal with the problem of a prospective applicant seeking to perpetuate fraud on the respondent. Whatever the answers to the questionnaire, on appellant's approach, respondent would have no power to refuse to pay the grant.

[28] The preferable answer to the present dispute is to accept that respondent was entitled to develop a policy to ensure that grants administered by it were given to genuine, *bona fide* parties which complied with a minimum set of requirements in order to be awarded the mandatory grant. For example, if the application of a discretionary grant to an employer is examined it is clear that a broader discretion

is given to the respondent to award such grants. In the case of a mandatory grant, however, respondent had to satisfy itself that training had taken place and that the training had been conducted by a recognized trainer. Once these questions had been adequately answered, there was no scope for any further discretion on behalf of the respondent in the award of the necessary grant. This conclusion finds clear support in the long standing *dictum* of Wessels CJ in City of Cape Town v Claremont Union College 1934 AD 414 at 420-421.

“Now I take it as settled law, as stated by my brother Stratford in Johannesburg Municipality v Davies (1925 AD at p 402), that what is reasonably incidental to the proper carrying out of an authorised act must be considered as impliedly authorized. Courts of law must consider the matter from the point of view of reasonableness; they must not hold that an act of a Corporation is *ultra vires* upon a narrow interpretation of the powers conferred on the Corporation by the statute. They must look at all the circumstances, and especially to the consequences of holding the act to be *ultra vires*.....

If it is found that in practice a municipality cannot carry out its functions in a reasonable manner unless it has a power to decide effectively a certain matter, then the Court must hold that the Legislature intended it to have that power of decision, and the consequences will be that what it decides will be *intra vires* and will bind the Council or the municipality.”

[29] In my view, the criteria developed by respondent represented the implementation of the kind of policy that was reasonably incidental to respondent properly carrying out its statutory functions in terms of s10 of the Act. It follows from this conclusion that the quality assurance criteria enabled respondent to fulfill its functions under the Act and to ensure that the purposes of the Act were properly implemented. Thus, there is no justification for appellant's case, that these criteria were *ultra vires* the Act and Regulations.

[30] For these reasons therefore, the appeal is dismissed with costs.

DAVIS JA

I agree

ZONDO JP

I agree

LEEUEW JA

Appearances

For the appellant Advocate M Brassey SC

For the respondent Advocate G Marcus SC

Date of Judgement 7 November 2008